UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MONDELĒZ GLOBAL, LLC

and Case 13-CA-170125

BAKERY, CONFECTIONERY, TOBACCO WORKERS & GRAIN MILLERS LOCAL UNION NO. 300, AFL-CIO-CLC.

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Richard L. Samson, Esq.
Norma Manjarrez, Esq.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART
155 North Wacker Drive - Suite 4300
Chicago, IL 60606
Phone: (312) 558-1220
Facsimile: (312) 807-3619

Dated: September 11, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

INTRODUCTION

The Respondent Mondelēz Global, LLC (the "Respondent" or "MG"), pursuant to Rule 102.46 of the National Labor Relations Board's (the "Board") rules, submits this brief in support of its limited Exceptions to the decision of Administrative Law Judge ("ALJ") Charles Muhl dated August 14, 2017.[1] While the ALJ correctly dismissed the complaint finding that Respondent did not violate Section 8(a)(5) by refusing to provide all of the information requested by the Union in its January 27, 2016 letter, the ALJ erred in finding that Respondent did not establish a legitimate claim of confidentiality. The ALJ further erred in finding that the statements of Respondent's witnesses were insufficient to establish Respondent's confidentiality claim. The Respondent's exceptions, therefore, are filed in the event exceptions are filed by the Counsel for the General Counsel and/or the Union as to the ALJ's findings on relevance and the Board is inclined to overrule those findings since the Respondent had also raised a confidentiality defense. The ALJ's findings on confidentiality, as more thoroughly explained below, are contrary to the law and record, and should not be upheld by the Board. That confidentiality defense, moreover, provides a sufficient, alternative, ground for the dismissal of the Complaint.

STATEMENT OF THE CASE

The initial charge in this proceeding filed by the Union and dated February 22, 2016, alleged the Respondent failed and refused to bargain in good faith with the Union as the collective bargaining representative of its employees by failing to furnish information requested by the Union in a letter dated January 27, 2016. (ALJD 2; Jt. Ex. 1). On October 28, 2016, the

---

[1]References to the ALJ's Decision are set forth as (ALJD _____). References to the stipulated record are set forth as "R at ¶___." References to the exhibits in the stipulated record are set forth as "Jt. Ex.___."

Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, consolidating Cases 13-CA-170125, 13-CA-176539, and 13-CA-177235. (Jt. Ex. 2). An Order severing Cases 13-CA-176539 and 13-CA-177235 from the instant case was issued on February 7, 2017. The parties settled the charges in the former two cases, leaving only the instant case for hearing. An Order postponing the hearing indefinitely for settlement purposes was issued on February 8, 2017. (Jt. Exs. 5–6). The parties agreed that the matter could be heard on a stipulated record. (ALJD 2). The proposed stipulation was filed on April 28, 2017 and approved by the Administrative Law Judge on May 3, 2017. (ALJD 2). Based on the stipulated record and the Parties written submissions, the ALJ found that the Respondent did not violate the National Labor Relations Act (the "Act") as alleged. (ALJD 2). The ALJ found that Respondent did not violate Section 8(a)(5) by refusing to provide all of the information requested by the Union in its January 27, 2016 letter where the relevance of the requested information to the Union's representational duties was not established. In reaching this conclusion, however, the ALJ found that while Respondent's refusal to provide all of the information requested by the Union was lawful because the Union failed to establish relevance, the Respondent had not established a legitimate confidentiality claim. (ALJD 14–15).

QUESTIONS INVOLVED

1. Did the ALJ err in finding that, if an evaluation of the Respondent's confidentiality claim were required, the Respondent did not establish a legitimate claim of confidentiality? (Exception I).
2. Did the ALJ err in finding that Respondent's statements were blanket and speculative assertions? (Exception II).

STATEMENT OF THE FACTS

A. The Union's December 11, 2015 Transfer of Work Grievance

On December 11, 2015, the Union filed a grievance alleging the transfer of bargaining unit work from Respondent's Chicago, Illinois plant to its Salinas, Mexico plant violated the following provisions of the 2012–2016 collective bargaining agreement then in effect (the "CBA"): Article 1 (Recognition); Article 2, Section 5 (Membership); Article 39 (Successorship); and Article 41 (Miscellaneous Clauses – Product Sourcing, Outsourcing, and Subcontracting). (ALJD 3–4; R. at ¶ 10; Jt. Ex. 10).

B. The Union's January 27, 2016 Information Demand

In its January 27 letter, the Union requested the following information for the transfer of work grievance:

1. Who is the "Employer" for the Salinas workers?
2. How many employees will be utilized at the Salinas operation to perform the Local bargaining unit work which the company intends to transfer?
3. Have any of those employees been hired, and, if so, when were they hired and the number of such employees?
4. Are the employees who will be performing the transferred bargaining unit work covered by a collective bargaining agreement; and, if so, the Union requests a copy of the agreement.
5. Are the employees who will be performing the transferred bargaining unit represented by a labor organization in connection with their hours, wages and working conditions and if so was the labor organization selected by the employees? If the labor organization was selected by the employees when and how did that occur [sic?]. If the employees did not participate in the selection of the labor organization when and how was the selection made? If there is a labor organization in place, has the Mexican government certified the organization as the representative of the employees and if so, the Union requests a copy of the certification?
6. What is or will be the hourly wage and benefits, if any, of the Salinas employees who will be performing the transferred bargaining unit work function?

7. When were the production facilities to be used for the production of the transferred bargaining unit work ordered from the suppliers? The Union requests copies of the orders.

8. When were the production facilities installed or will be installed at the Salinas site?

(ALJD 4–5; R. at ¶ 11; Jt. Ex. 9).

Upon receipt of the January 27 information demand, the Respondent sent a letter dated January 29, 2016 acknowledging receipt of the Union's requests and by e-mail dated February 5, 2016 provided a timeframe for the Respondent's response. (ALJD 5; R. at ¶ 13–14; Jt. Exs. 10-11). Within that timeframe, in a letter dated February 17, 2016, the Respondent addressed each item in the January 27 information demand, providing some of the information requested and objecting to requests for which the Respondent sought an explanation of their relevance to the transfer of work grievance. (ALJD 5; R. at ¶ 15; Jt. Ex. 12). Thereafter, the Respondent and the Union exchanged a number of communications regarding the January 27 information demand. (ALJD 5). Through these communications, the Respondent replied to each item in the Union's January 27 information demand by either providing the requested information, asserting legitimate objections thereto, or offering to produce certain proprietary and confidential information pursuant to a proposed confidentiality agreement it has been willing to bargain over.

C. Respondent's Confidentiality Claim

Where the Respondent did not provide the requested information, the Respondent asserted objections on the basis of, *inter alia*, confidentiality. The Respondent informed the Union that information contained in the Salinas labor agreement is proprietary and highly confidential because it contains information related to the labor costs for manufacturing the Respondent's product as well as information from which certain aspects of the Respondent's manufacturing methods in the Salinas plant can be determined. (ALJD 8 n.11; R. at ¶ 22; Jt.

Exs. 16, 19). The Respondent further established that information disclosing the number of employees employed in manufacturing positions also reveals the nature and extent of the Salinas plant's production process, which the Respondent deems proprietary. (ALJD 8 n.11; Jt. Ex. 19). Information regarding the formation of the Salinas union is also deemed a matter of proprietary and confidential interest because of the labor relations strategies associated with the union recognition process under Mexican labor law. Such strategies also include whether to invoke specific legal rights under Mexican labor law. (R. at ¶ 22; Jt. Ex. 19).

Specifically, the Respondent has a proprietary interest in preserving the confidentiality of information related to, and documents showing, the wage and benefits received by the Salinas workforce as well as information regarding the number of employees in Salinas and when and how the union in Salinas was selected. (R. at ¶ 22; Jt. Ex. 19). Moreover, as indicated in the Respondent's August 9 letter, the Union and its International Union represent a number of the Respondent's competitors for whom the wages, benefits, conditions of employment, methods of production and the process by which the Salinas union was recognized would be of interest, particularly for any one of those competitors that may be seeking to open a manufacturing facility in Mexico. (R. at ¶ 22; Jt. Ex. 17, 19). Additionally, the Respondent established that information concerning the purchase of equipment that was installed in the Salinas plant such as the ovens used to manufacture the Respondent's product and, in particular, information concerning the Respondent's suppliers, as well as the costs associated with the purchase of such equipment, is also deemed by the Respondent to be proprietary and confidential. (Jt. Exs. 16, 19). The Respondent's negotiated pricing with its suppliers is the result of the goodwill and purchasing track record it has built with those suppliers over a period of years and would be of interest to any of the Respondent's competitors in relation to the market price they may pay for

similar equipment. (R. at ¶ 22; Jt. Ex. 19). For these substantial reasons, the Respondent proposed a confidentiality agreement under which it would release the information requested in the Union's January 27 information demand and has expressed its continued willingness to bargain over the form and content of such an agreement. (Jt. Exs. 16, 18, 21, 23, 27(g)).

ANALYSIS

The ALJ correctly found that Respondent's refusal to provide all of the information requested by the Union was lawful because the Union failed to establish the relevance of the requested information to the Union's representational duties. (ALJD 14–15). The ALJ erred, however, in finding that, if an evaluation of the Respondent's confidentiality defense were required, the Respondent did not establish a legitimate claim of confidentiality. (ALJD 14–15). The ALJ's findings on confidentiality, as more thoroughly explained below, are contrary to the law and the record, and should be dismissed.

Board law dictates that where an employer has provided a legitimate reason for not providing the requested information, the employer is excused from providing the information or from providing it in the form requested. *United Parcel Serv. of Am., Inc.*, 362 NLRB No. 22 (2015) (finding the employer did not violate the Act when it timely asserted its concerns with information requests and attempted to reach an accommodation with the union but the union never indicated why the employer's proposals would not satisfy its needs) (citing *American Cyanamid*, 129 NLRB 683, 684 (1960); *Good Life Beverage Co.*, 312 NLRB 1060, 1062 (1993); and *Century Air Freight*, 284 NLRB 730, 734-735 (1987)). The employer must "articulate those concerns to the union and make a timely offer to cooperate with the union to reach a mutually acceptable accommodation. . . . [c]orrespondingly, where an employer fulfills those obligations, the union may not ignore the employer's concerns or refuse to discuss a

possible accommodation, even when the requested information is presumptively relevant." *United Parcel Serv. of Am., Inc.*, 362 NLRB No. 22 (2015); *see East Tennessee Baptist Hospital v. NLRB,* 6 F.3d 1139 (6th Cir. 1993) (employer's offer to provide confidential information to a neutral third-party CPA was reasonable, because union failed to establish that its need for the information outweighed the employer's compromise offer); *Oil, Chemical and Atomic Workers v. NLRB,* 711 F.2d 348 (D.C. Cir. 1983).

The Board recognizes that proprietary information may be confidential. *See, e.g., Detroit Newspaper Agency*, 317 NLRB at 1073. Indeed, in *Kelly-Springfield*, where the company refused to produce information regarding chemical materials used in its plant as well as its handling precaution sheets based on a "proprietary interest in the material requested and the need to keep them secret from competitors" the Board found in favor of the company. *Kelly-Springfield Tire Co.*, 266 NLRB 587 (1983). The Board determined that the company had "asserted a legitimate defense, which on its face could possibly privilege nondisclosure of the information or require only conditional disclosure." *Id.* (citing *Plough, Inc.*, 262 NLRB 1095 (1982); *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982)). Pursuant to this determination, the Board modified the administrative law judge's findings and recommended an order directing the parties to bargain over the production of information implicating the company's proprietary trade secrets. In reaching this decision, the Board did not require the employer to provide evidence that the union intended to disclose the requested information to its competitors, which is precisely what the ALJ requires of the Respondent in this case.

Here, the record evidence shows that the Respondent has established that it has an unmistakable proprietary interest in preserving the confidentiality of information related to, and documents showing, the wage and benefits received by the Salinas workforce as well as

information regarding the number of employees in Salinas and when and how the Salinas labor organization was selected particularly where, as here, the party seeking the information represents a number of the Respondent's competitors. The Respondent established, through statements by Seeber and DiStefano, that the wages, benefits, conditions of employment, methods of production and the process by which the Salinas union was recognized may be of interest to the Respondent's competitors, particularly for any one of those competitors that may be seeking to open a manufacturing facility in Mexico. The Respondent has further established that information concerning the purchase of equipment that was installed in the Salinas plant such as the ovens used to manufacture the Respondent's product is also deemed by the Respondent to be highly confidential and proprietary. The Union has not questioned the Respondent's assertion, and indeed, throughout its communications starting in June 2016 it entertained the proposal to enter into a confidentiality agreement.

Yet, despite the record evidence, the ALJ found Respondent did not establish a legitimate and substantial confidentiality interest. The ALJ further found that the statements of Seeber and DiStefano were conclusory assertions of confidentiality. In this regard, the ALJ's findings are contrary to the law and the record evidence. Where the respondent provides a legitimate reason for not producing the requested information, as did the Respondent in this case —explaining why certain information is deemed by the Respondent to be propriety and confidential— the respondent has met its burden of establishing its defense to the production of that information. Accordingly, the ALJ erred in his application of Board law on the issue of the Respondent's confidentiality claim.

Public Service Company, for example, a case relied on by the ALJ, stands for the position that in order to establish a confidentiality defense, an employer must provide more than a general

statement that the information is confidential. *Pub. Serv. Co. of New Mexico*, 364 NLRB No. 86 (Aug. 22, 2016). There, the Union requested "'any and all documentation that [the Respondent] used or considered . . . in determining the terminations,' including the discharge memoranda and interview notes" and the respondent refused to provide some of the information claiming that it had not relied on that information and that "the information was otherwise 'confidential.'" *Id.* at *2–*3. The Board found that the respondent's "bare claim of confidentiality, *without more*, was insufficient to justify its refusal to provide the notes." *Id.* (emphasis added). Unlike *Public Service Company*, through Seeber and DiStefano, the Respondent expounded on the reasons why the wages, benefits, conditions of employment, methods of production and the process by which the Salinas union was selected was proprietary and confidential. The case is simply not analogous. Unlike those cases (referring back to *Public Service Company*, as an example), Seeber and DiStefano provided more than blanket and speculative assertions evidencing the Respondent's substantial and legitimate confidentiality interest.

In *King Broadcasting,* also relied on by the ALJ, the union requested only single copies of service contracts pertaining to specific bargaining unit members and had "offered not to share them with employees or agents who might compromise their confidentiality with King's competitors." *King Broad. Co.*, 324 NLRB 332, 338 (1997). The Board relied on King's statement that it would not share the information with those who might compromise confidentiality to determine that the respondent could not withhold the information beyond that point. *King Broad. Co.*, 324 NLRB 332, 338 (1997) (citing *Dallas & Mavis Forwarding Co.*, 291 NLRB 980 (1988), *enfd.* 909 F.2d 1484 (6th Cir. 1990)). The Union has made no such assurances here. Similarly, in *Dallas & Mavis Forwarding Co.*, 291 NLRB 980 (1988), *enfd.* 909 F.2d 1484 (6th Cir. 1990), the Board found the employer's delay in providing the requested

information justified until the union focused its request and made assurances that it would preserve confidentiality.

The ALJ also cites to *Howard Industries* where the union sought information related to coil winding standards used to evaluate employee efficiency and the Board found the respondent did not establish it had a legitimate and substantial interest in keeping that information confidential because it did not show how the process of creating similar coils was different from its competitors or that the coils were different in nature from those of its competitors. *Howard Indus., Inc.*, 360 NLRB 891, 892 (2014). What *Howard Industries* reveals is that the Board does not have a unified position on what constitutes a legitimate and substantial confidentiality claim. In contrast to the decision in *Howard Industries*, the Board had not previously required such detailed justifications for the confidentiality assertion (and for good reason, because to hold otherwise would put an impossible burden on the employer to be able to demonstrate what its competitors know or do).

The more appropriate approach is that of the dissent in which Member Johnson found that "while somewhat generalized in presentation, [the respondent's evidence] was sufficient to establish that the Respondent had a legitimate and substantial confidentiality interest" in certain information when the respondent's evidence showed that "disclosure to a competitor would be of significant economic value because they would allow a competitor to determine the most time efficient way to build a particular coil, their contents are not generally known or discoverable, and the Respondent has taken reasonable efforts to maintain their secrecy." *Id.* Indeed, the Respondent in this case has established a substantial and legitimate confidentiality interest because the record evidence shows that Respondent has a proprietary interest in preserving the confidentiality of information from competitors for whom the wages, benefits, conditions of

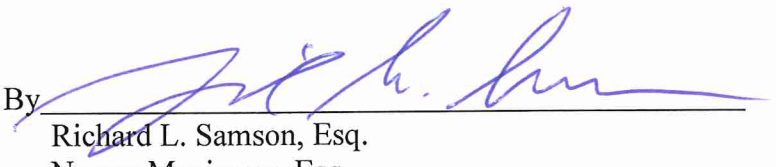
employment, methods of production and the process by which the Salinas union was recognized would be of interest, particularly for any one of those competitors that may be seeking to open a manufacturing facility in Mexico.

CONCLUSION

For the foregoing reasons, in the event the Board is inclined to overrule the ALJ's findings on relevance, the Board should not uphold the ALJ's finding that the Respondent failed to establish a legitimate confidentiality claim. Further, since Respondent has made the necessary showing to justify its confidentiality claim, and because Respondent has offered to bargain over that claim, it has fulfilled its bargaining obligations thus justifying the dismissal of the Complaint on this alternative basis as well.

DATED this 11th day of September, 2017.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By 

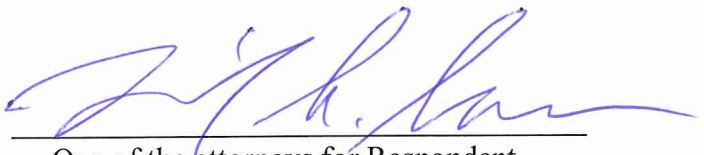
Richard L. Samson, Esq.
Norma Manjarrez, Esq.
155 North Wacker Drive - Suite 4300
Chicago, IL 60606
Phone: (312) 558-1220
Facsimile: (312) 807-3619

CERTIFICATE OF SERVICE

I certify that on September 11, 2017, a copy of the foregoing ***RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION*** was Electronically Filed as a .pdf document via the NLRB's e-filing system and transmitted via e-mail to the following parties:

Vivian Robles
Counsel for the General Counsel
NATIONAL LABOR RELATIONS BOARD – Region 13
219 South Dearborn Street – Suite 808
Chicago, IL 60604
Vivian.robles@nlrb.gov

Gil Cornfield, Esq.
Elisa Redish, Esq.
CORNFIELD AND FELDMAN LLP
25 East Washington Street – Suite 1400
Chicago, IL 60602
gcornfield@cornfieldandfeldman.com
eredish@cornfieldandfeldman.com



One of the attorneys for Respondent

031910-000240
31165374.1